Teckland Motors Sdn Bhd v Pang Guan Hong & Ors (Tan Hooi Keng & Ors, interveners)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO PA-22NCVC-174–12 OF 2022
ANAND PONNUDURAI J
1 MARCH 2024

Contract — Formation — Condition precedent — Sale of same property by defendants to plaintiff and interveners — Whether there was a binding sale and purchase agreement between defendants and interveners prior to any concluded agreement with plaintiff — Whether there was a binding sale and purchase agreement between defendants and plaintiff — Whether agreement to sell property to plaintiff was a contingent contract — Whether interveners' rights prevailed over plaintiff's purchase of property — Whether plaintiff's offer to purchase was accepted by first defendant or were there conditions precedent which were then not met — Whether plaintiff had caveatable interest to lodge private caveat — Contracts Act 1950 s 33

The dispute in the present case was in relation to the sale and purchase of a shop lot ('the property') owned by the defendants. The defendants had agreed to sell the property to the interveners and for such purpose, they had accepted payment of deposit amounting to RM3,000 from the interveners. However, the plaintiff in the present case contended that the defendants had also accepted a deposit of RM20,000 from the plaintiff for the sale of the same property. In relation to this contention, the first defendant testified that he had informed the plaintiff's representative, one Mr Tan that his offer to purchase the property could only be considered if the interveners failed to obtain the bank loan or decided to cancel their purchase as well as on the condition that the second and third defendants agreed to sell the said property to Mr Tan. In response, Mr Tan requested the first defendant to retain the RM20,000 to show his interest while awaiting the decision of the interveners and the second and third defendants. The first defendant agreed to accept the amount on the understanding that such amount would be returned to the plaintiff if the interveners continued with the purchase or if the other defendants did not agree to sell to the plaintiff. However, when the interveners wanted to continue with the purchase, the plaintiff refused to accept the return of the RM20,000 from the first defendant which led to the filing of a police report by the first defendant's sister (DW2). The interveners had lodged a private caveat on the title of the property and subsequently, the plaintiff had also lodged a private caveat which in effect blocked the defendants and the interveners from proceeding with the sale and purchase of the property. In the present action, the plaintiff sought a declaration that there was a valid sale and purchase agreement

between the plaintiff and the defendants and specific performance of the same ('the plaintiff's claim') whilst the defendants and the interveners counterclaimed for the plaintiff to remove the private caveat. The issues arose were: (a) whether there was a binding sale and purchase agreement between the defendants and the interveners prior to any concluded agreement with the plaintiff and/or whether there was a binding sale and purchase agreement between the defendants and the plaintiff; (b) whether the interveners' rights prevailed over the plaintiff's purported purchase of the said property; (c) whether the plaintiff's offer to purchase was accepted by the first defendant or were there conditions precedent which were then not met; and (d) whether the plaintiff had a caveatable interest to lodge a private caveat on the title of the said property.

Held, dismissing the plaintiff's claim, and allowing the counterclaims with no order as to costs:

(1) Based on the conduct and the contemporaneous documents available at the material time, the court found that the first defendant's version was more probable. There were indeed conditions precedent attached to the offer/acceptance which were communicated to the plaintiff. The plaintiff's offer was conditional on the interveners aborting the sale and the other co-owners agreeing to the sale to the plaintiff. Even if the offer from the plaintiff was unqualified, it was certainly followed by a conditional acceptance and there could be no legally binding contract unless those conditions were fulfilled. Those conditions were certainly not fulfilled in this case, as such, there was no binding agreement between the defendants and the plaintiff (see paras 34–35, 42 & 50).

(2) On the other hand, the court found that there was a valid and binding agreement between the defendants and the interveners because there was an unqualified offer by the interveners with an unqualified acceptance by the first defendant, certainty of parties, certainty of price and certainty of property. Further, there were unequivocal acts of part performance of the interveners by way of payment and acceptance of the said deposit. The intention of the interveners to create legal relations was fortified by the preparation of the draft sale and purchase agreement and the balance 10% deposit sum forwarded to the defendants' solicitors. Therefore, the court opined that there was a concluded contract despite there being no formally executed agreement (see paras 44–46 & 50).

(3) The plaintiff's witness, SP1, had admitted during cross-examination that the first defendant had informed him during the meeting on 21 December 2021 that there was an existing agreement with the interveners and that such agreement would be cancelled. The court agreed with the defendants that the above was indicative that the agreement to sell the said property to the plaintiff was a contingent

contract under s 33 of the Contracts Act 1950 and that such contract could not be enforced as the event of the cancellation of the agreement with the interveners did not occur (see paras 48–49).

(4) Having considered the facts and sequence of events in its totality, the court found that it was the interveners who had first reached an agreement and made the deposit for the said property. Further, it was the interveners who had first lodged the private caveat on the said property. Relying on the Federal Court case of *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F)* [1984] 1 MLJ 160, the court concluded that when there were two competing equitable interests, the general rule of equity was that the person whose equity was attached first would be entitled over the priority of others. As such, the court found that being first in time, the interveners' rights prevailed over any of that may belong to the plaintiff (see paras 51 & 53–54).

(5) The court agreed with the contentions of the defendants and the interveners that there was no caveatable interest if there were conditions precedent in that there was no contract to be completed until the conditions precedent had been fulfilled. In the present case, the court had found that there were indeed conditions precedent of sale with the plaintiff which had not been fulfilled rendering no valid and binding agreement, as such, there was no basis for the plaintiff's private caveat to be maintained. Even assuming for a moment that there was a caveatable interest on 27 December 2021 due to the payment of the deposit by the plaintiff, that interest if any, had certainly lapsed by virtue of the conditions precedent not being met. Considering that there was no caveatable interest, the court ordered that the private caveat entered by the plaintiff on the property to be removed. The court, however, did not go so far as to grant the declaration that the private caveat entered by the plaintiff was wrong in the first place. On that basis, the court also did not see it fit to make any order for damages against the plaintiff for the registration of such caveat. In any event, the defendants and the interveners did not adduce any evidence on any losses suffered as a result of the entry of the private caveat (see paras 57–58 & 62–63).

[Bahasa Malaysia summary

Pertikaian dalam kes ini adalah berkaitan dengan penjualan dan pembelian lot kedai ('hartanah tersebut') yang dimiliki oleh defendan-defendan. Defendan-defendan telah bersetuju untuk menjual hartanah tersebut kepada pencelah-pencelah dan untuk tujuan tersebut, mereka telah menerima bayaran deposit berjumlah RM3,000 daripada pencelah-pencelah. Bagaimanapun, plaintif dalam kes ini berhujah bahawa defendan-defendan juga telah menerima deposit sebanyak RM20,000 daripada plaintif untuk penjualan hartanah yang sama. Berhubung dengan pertikaian ini, defendan pertama memberi keterangan bahawa dia telah memaklumkan wakil plaintif, seorang

Encik Tan bahawa tawarannya untuk membeli hartanah tersebut hanya boleh dipertimbangkan jika pencelah-pencelah gagal mendapatkan pinjaman bank atau memutuskan untuk membatalkan pembelian mereka serta dengan syarat defendan kedua dan ketiga bersetuju untuk menjual hartanah tersebut kepada Encik Tan. Sebagai tindak balas, Encik Tan meminta defendan pertama menyimpan wang RM20,000 tersebut untuk menunjukkan minatnya sementara menunggu keputusan pencelah-pencelah dan defendan kedua dan ketiga. Defendan pertama bersetuju menerima jumlah tersebut atas persefahaman bahawa jumlah tersebut akan dikembalikan kepada plaintif jika pencelah-pencelah meneruskan pembelian atau jika defendan-defendan lain tidak bersetuju untuk menjual kepada plaintif. Bagaimanapun, apabila pencelah-pencelah mahu meneruskan pembelian, plaintif enggan menerima pemulangan RM20,000 daripada defendan pertama yang membawa kepada pemfailan laporan polis oleh kakak defendan pertama (DW2). Pencelah-pencelah telah memasukkan kaveat persendirian ke atas hakmilik hartanah tersebut dan seterusnya, plaintif juga telah memasukkan kaveat persendirian yang pada dasarnya telah menghalang defendan-defendan dan pencelah-pencelah daripada meneruskan penjualan dan pembelian hartanah tersebut. Dalam tindakan semasa, plaintif memohon pengisytiharan bahawa terdapat perjanjian jual beli yang sah antara plaintif dan defendan-defendan dan pelaksanaan spesifik perjanjian tersebut ('tuntutan plaintif') manakala defendan-defendan dan pencelah-pencelah menuntut balas untuk plaintif membatalkan kaveat persendirian tersebut. Isu-isu yang timbul ialah: (a) sama ada terdapat perjanjian jual beli yang mengikat antara defendan-defendan dan pencelah-pencelah sebelum apa-apa perjanjian dimuktamadkan dengan plaintif dan/atau sama ada terdapat perjanjian jual beli yang mengikat antara defendan-defendan dan plaintif; (b) sama ada hak pencelah-pencelah tersebut mengatasi dakwaan pembelian oleh plaintif ke atas hartanah tersebut; (c) sama ada tawaran plaintif untuk membeli telah diterima oleh defendan pertama atau terdapat syarat-syarat terdahulu yang kemudiannya tidak dipenuhi; dan (d) sama ada plaintif mempunyai kepentingan boleh kaveat untuk memasukkan kaveat persendirian ke atas hakmilik hartanah tersebut.

Diputuskan, menolak tuntutan plaintif, dan membenarkan tuntutan-tuntutan balas tanpa perintah berkaitan kos:

(1) Berdasarkan kelakuan dan dokumen-dokumen semasa yang ada pada masa material, mahkamah mendapati bahawa versi defendan pertama lebih berkemungkinan. Memang terdapat syarat-syarat terdahulu yang diletakkan pada tawaran/penerimaan yang telah dimaklumkan kepada plaintif. Tawaran plaintif adalah tertakluk kepada pencelah-pencelah yang membatalkan penjualan dan pemilik-pemilik bersama lain bersetuju untuk penjualan kepada plaintif. Walaupun tawaran daripada plaintif tidak bersyarat, ia pastinya diikuti dengan penerimaan bersyarat dan tidak boleh ada kontrak yang mengikat secara sah melainkan syarat

tersebut dipenuhi. Syarat-syarat tersebut sememangnya tidak dipenuhi dalam kes ini, oleh itu, tiada perjanjian yang mengikat antara defendan-defendan dan plaintif (lihat perenggan 34–35, 42 & 50).

(2) Sebaliknya, mahkamah mendapati terdapat perjanjian yang sah dan mengikat antara defendan-defendan dan pencelah-pencelah kerana terdapat tawaran tidak bersyarat oleh pencelah-pencelah dengan penerimaan tanpa syarat oleh defendan pertama, kepastian pihak-pihak, kepastian harga dan kepastian hartanah. Selanjutnya, terdapat tindakan-tindakan jelas pelaksanaan sebahagian daripada pencelah-pencelah melalui pembayaran dan penerimaan deposit tersebut. Niat pencelah-pencelah untuk mewujudkan hubungan undang-undang diperkukuh dengan penyediaan draf perjanjian jual beli dan baki 10% jumlah deposit yang dimajukan kepada peguam cara defendan-defendan. Oleh itu, mahkamah berpendapat bahawa terdapat kontrak yang dimuktamadkan walaupun tiada perjanjian yang dilaksanakan secara rasmi (lihat perenggan 44–46 & 50).

(3) Saksi plaintif, SP1, telah mengaku semasa pemeriksaan balas bahawa defendan pertama telah memaklumkan kepadanya semasa pertemuan pada 21 Disember 2021 bahawa terdapat perjanjian sedia ada dengan pencelah-pencelah dan perjanjian tersebut akan dibatalkan. Mahkamah bersetuju dengan defendan-defendan bahawa perkara di atas menunjukkan bahawa perjanjian untuk menjual hartanah tersebut kepada plaintif adalah kontrak kontinjen di bawah s 33 Akta Kontrak 1950 dan bahawa kontrak tersebut tidak boleh dikuatkuasakan kerana kedaan pembatalan perjanjian tersebut dengan pencelah-pencelah tidak berlaku (lihat perenggan 48–49).

(4) Setelah mempertimbangkan fakta dan urutan kejadian secara keseluruhannya, mahkamah mendapati bahawa pencelah-pencelah yang telah terlebih dahulu mencapai persetujuan dan membayar deposit untuk hartanah tersebut. Tambahan pula, pencelah-pencelah yang terlebih dahulu memasukkan kaveat persendirian ke atas hartanah tersebut. Bergantung kepada kes Mahkamah Persekutuan *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F)* [1984] 1 MLJ 160, mahkamah membuat kesimpulan bahawa apabila terdapat dua kepentingan saksama yang bersaing, peraturan am ekuiti ialah orang yang ekuitinya dilampirkan dahulu akan mendapat hak atas keutamaan orang lain. Oleh itu, mahkamah mendapati bahawa sebagai yang pertama, hak pencelah-pencelah mengatasi mana-mana yang mungkin dimiliki oleh plaintif (lihat perenggan 51 & 53–54).

(5) Mahkamah bersetuju dengan hujahan defendan-defendan dan pencelah-pencelah bahawa tiada kepentingan boleh kaveat sekiranya terdapat syarat-syarat terdahulu iaitu tiada kontrak yang perlu dimuktamadkan sehingga syarat-syarat terdahulu telah dipenuhi. Dalam

kes ini, mahkamah telah mendapati bahawa memang terdapat syarat-syarat terdahulu jualan dengan plaintif yang tidak dipenuhi menyebabkan tiada perjanjian yang sah dan mengikat, oleh itu, tiada asas untuk kaveat persendirian plaintif dikekalkan. Walaupun dengan mengandaikan untuk seketika bahawa terdapat kepentingan boleh kaveat pada 27 Disember 2021 disebabkan pembayaran deposit oleh plaintif, kepentingan tersebut jika ada pun, sudah pasti luput disebabkan syarat-syarat terdahulu yang tidak dipenuhi. Memandangkan tiada kepentingan boleh kaveat, mahkamah memerintahkan supaya kaveat persendirian yang dimasukkan oleh plaintif ke atas hartanah tersebut dibatalkan. Mahkamah bagaimanapun tidak bertindak sehingga membenarkan pengisytiharan bahawa kaveat persendirian yang dimasukkan oleh plaintif adalah salah sejak awal lagi. Atas dasar itu, mahkamah juga tidak melihat wajar untuk membuat apa-apa perintah ganti rugi terhadap plaintif bagi pendaftaran kaveat tersebut. Dalam apa jua keadaan, defendan-defendan dan pencelah-pencelah tidak mengemukakan apa-apa keterangan mengenai apa-apa kerugian yang dialami akibat kemasukan kaveat persendirian tersebut (lihat perenggan 57–58 & 62–63).]

Cases referred to

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746, CA (refd)

Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd [2018] 5 MLJ 380; [2018] 9 CLJ 311, CA (refd)

Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara [2007] 1 MLJ 248; [2006] 4 CLJ 981, HC (refd)

Ketua Setiausaha Kementerian Pertahanan Malaysia & Anor v Bumita Sdn Bhd [2018] 12 MLJ 275; [2018] 9 CLJ 484, CA (refd)

Low Kar Yit & Ors v Mohamed Isa & Anor [1963] 1 MLJ 165; [1963] 1 LNS 77 (refd)

Mahabuilders Sdn Bhd v Pentadbir Tanah Johor Bahru & Anor [2013] 10 MLJ 625, HC (refd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211; [1983] CLJ Rep 282, FC (refd)

Sinku Akramuz Zaman & Ors v Sri Vijaya Estates Sdn Bhd [2022] MLJU 741, HC (refd)

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F) [1984] 1 MLJ 160, FC (folld)

Legislation referred to

Contracts Act 1950 s 33
National Land Code Form 19B

Premkumar Danapal (Hng & Partners) for the plaintiff.
YC Chuah (Sim & Sean) for the defendants.
Elson Beh Hong Shie (with Wai See Chua) (YC Wong) for the interveners/defendants.

Anand Ponnudurai J:

INTRODUCTION

[1] At the centre of this case is a shoplot in Bandar Nibong Tebal jointly owned by the three defendants above named. Being a double-storey shoplot and despite being not in the best of condition and with a value of approximately only RM250,000, the plaintiff and the three interveners in this case who were both carrying on businesses nearby were intent on purchasing the same.

[2] The problem is that the defendants as owners having agreed to sell to the interveners and accepting a deposit then subsequently also accepted several days later a deposit from the plaintiff with the plaintiff contending that the defendant had also agreed to sell the property held under the title of Geran No 23862, Lot No 63, Bandar Nibong Tebal, Daerah Seberang Perai Selatan, Pulau Pinang, bearing the assessment address of No 91, Jalan Atas, 14300 Nibong Tebal, Pulau Pinang (hereinafter referred to as the 'said property') to the plaintiff.

[3] Whilst the defendants are still registered as the owners of the said property today with there being two separate private caveats registered on the same by the interveners and the plaintiff respectively, this court is thus tasked with the aid of a full trial to determine who has a concluded contract and/or a valid sale and purchase agreement with the defendants.

[4] Although the plaintiff has initially commenced these proceedings against the defendants seeking a declaration that there is a valid sale and purchase agreement between them and specific performance of the same, vide court order dated 21 March 2023, the interveners were allowed to intervene in this present suit on the basis that the decision made in this suit will have a bearing on the interest of the interveners as the defendants and the interveners have entered into a sale and purchase agreement though yet to be executed.

[5] The defendants have denied the plaintiff's claim and mounted a counterclaim for the plaintiff to remove the private caveat entered by the plaintiff on the said property. Such a similar counterclaim has been mounted by the interveners.

[6] I will herein below set out the salient background facts, issues to be tried, the parties' respective submissions/contentions, the applicable law and my analysis of the same in determining whether the plaintiff has successfully proven his claim against the defendants and whether the defendants and the interveners have proven their counterclaim against the plaintiff on a balance of probabilities.

THE BACKGROUND FACTS/SEQUENCE OF EVENTS

[7] The background facts and sequence of events are largely undisputed as can be gleaned from the pleadings and evidence adduced at trial. These facts can be summarised as follows.

[8] At all material times, the defendants are the registered proprietors of the said property with each holding 1/3 share each.

[9] It is the defendants' pleaded case and the testimony of the first defendant that in or about December 2021, he and the second and third defendants decided to sell the said property. The three interveners who were already carrying out a porridge stall nearby known as Cheng Hwa Seafood offered to purchase the said property for a purchase price of RM 250,000 with the aid of a bank loan.

[10] Upon meeting and discussing with the second and third defendants, all three defendants agreed to accept the said offer from Cheng Hwa Seafood whereafter a deposit of RM3,000 was paid/accepted by the defendants. The documentary evidence of the deposit tendered in court clearly reflects that it was a deposit towards the purchase of the said property. This RM3,000 deposit was subsequently distributed equally among the defendants. The evidence of the first defendant is corroborated by the evidence of the first intervener who had testified in court.

[11] It is the defendants' pleaded case and the first defendant's testimony that thereafter on 21 December 2021, the plaintiff's representative, one Mr Tan Joo Min ('PW1') met the first defendant wherein the following transpired:

(a) Mr Tan brought with him RM20,000 cash to meet the first defendant and told him of his intention to purchase the said property;

(b) Mr Tan told the first defendant that he would use the plaintiff company to purchase the said property at a sum of RM240,000 by cash (without any loan from a financial institution) by way of:

(i) RM20,000 would be paid as deposit;

(ii) further RM20,000 would be paid upon execution of the sale and

purchase agreement by all parties; and

(iii) the balance of RM200,000 would be paid in monthly instalments of RM15,000 per month until full settlement;

(c) Mr Tan informed the first defendant that he could pay the RM20,000 cash immediately as a deposit if his offer was accepted as he has brought the cash;

(d) the first defendant informed Mr Tan at this meeting that all the defendants had already agreed to sell the said property to the interveners and had received a deposit from them but awaiting approval from the bank. The first defendant also testified that Mr Tan tried to persuade him to sell the said property to the plaintiff and offered cash by paying a deposit of RM20,000 with a balance of RM15,000 in monthly instalments;

(e) in response, the first defendant informed Mr Tan that his offer could only be considered if the interveners failed to obtain the bank loan or decided to cancel their purchase as well as a condition that the second and third defendants also agreed to sell the said property to Mr Tan;

(f) the first defendant testified that after hearing the first defendant's response, Mr Tan requested the first defendant to retain the RM20,000 to show his interest while awaiting the decision of the interveners and the second and third defendants;

(g) the first defendant testified that he agreed to accept such RM20,000 booking fees on the said understanding/conditions and that the RM20,000 would be returned to the plaintiff if the interveners continued with the purchase or if the other defendants did not agree to sell to the plaintiff; and

(h) upon/on the above understanding/conditions, the first defendant then signed the voucher of the plaintiff dated 21 December 2021 confirming the receipt of RM20,000 as a deposit.

[12] The first defendant testified that he then met the second and third defendants at his shop on the next day to discuss Mr Tan's offer which was rejected by the second and third defendants on the basis that they had already agreed to sell the said property to the interveners and would only consider selling to the plaintiff if Cheng Hwa Seafood cancelled their purchase. The first defendant then contacted the interveners the next day and he was informed that they intended to proceed with the purchase and would do so on a cash basis even if their application for loan was not obtained.

[13] Upon having obtained such feedback from the second and third defendants and the interveners, the first defendant went on 24 December 2021

to the plaintiff's office to inform him of the status of the same and to return the deposit sum of RM20,000. However, the said Mr Tan refused to accept the deposit sum of RM20,000 and wanted the defendants to sell the said property to the plaintiff. The first defendant then requested his sister, Ms Pang Kooi Booi (the wife of the second defendant) to return the same which she tried but with no success and she thereafter made a police report. Ms Pang Kooi Booi ('DW2') testified in court and adduced the police report confirming the first defendant's evidence in this respect.

[14] It is undisputed that on 24 December 2021, the interveners lodged their private caveat on the title of the said property pending the completion of the sale and purchase transaction and the plaintiff thereafter also lodged a private caveat on the said property on 27 December 2021. In both applications to enter such private caveats, both relied on the fact that they had an agreement with the defendants in respect of the said property and a deposit has been paid.

[15] Thereafter, on 28 December 2021, the defendants through their solicitors wrote to the plaintiff setting out what had transpired at the meeting on 21 December 2021 and reiterating therein the conditions precedent that were made known at the said meeting. In the said letter, it was also notified that such conditions precedent have not been met and enclosed thereto a cheque for RM20,000 being a refund for the deposit paid.

[16] In the meantime, the solicitors for the interveners had sent a letter also dated 28 December 2021 to the solicitors for the defendants enclosing thereto a draft sale and purchase agreement and the balance of the 10% deposit of the purchase price. However, it transpires that the defendants were unable to proceed with the purchase due to the entry of the private caveat by the plaintiff.

[17] In response to the defendants' letter dated 28 December 2021 returning the RM20,000 deposit, the plaintiff on 25 January 2022 vide its previous solicitors, Messrs Ng & Teo issued a letter in response contending that such conditions precedent was never discussed and returned the deposit sum of RM20,000 with a demand that a sale and purchase agreement be entered into within 14 days from the date of the letter.

[18] It is to be noted at this juncture that the defendants contend that prior to the commencement of this present suit, no draft sale and purchase agreement was ever prepared by the plaintiff for the defendants' execution. Similarly, although a draft sale and purchase agreement has been sent by the interveners at the material time, no sale and purchase agreement has been executed to date between the defendants and interveners due to the plaintiff's private caveat.

[19] With the background facts and sequence of events, I will now set out the issues to be tried and my analysis of the same after considering the evidence and considering the respective contentions.

TRIAL

[20] It is to be noted that the full trial was conducted and concluded in one day on 23 November 2023 with the following seven witnesses testifying.

No	Witnesses	Marked as
Plaintiff's witness		
1	Tan Joo Min	WSP1
2	Ong Chin Lam	WSP2
Defendant' witness		
1	Pang Kooi Booi	WSD2
2	Lee Lin Ho	WSD3
3	Lim Ngo Chu	WSD4
4	Pang Guan Hong	WSD5
Interverners' witness		
1	Tan Hooi Kheng	WSD1

ISSUES TO BE TRIED

[21] Prior to trial, parties have set out eight issues to be tried including an issue of whether the first defendant had misrepresented to the plaintiff that he was authorised to represent the second and third defendants and/or authorised to accept the deposit of RM20,000. However, as the plaintiff's submission centred predominantly on a submission that there was a concluded contract between the plaintiff and the defendants and no substantive submissions made on the issue of misrepresentation, it is clear to me that the issue of misrepresentation is not of much significance. In any event, it would appear that the first defendant acted as an agent and certainly had the authority to discuss a sale with potential purchasers. However, he would be required to revert to the second and third defendants on any offers to confirm their acceptance as well.

[22] As such, in my view, the following issues which require judicial determination can be summarised as follows:

(a) whether there is a binding sale and purchase agreement between the defendants and the interveners prior to any concluded agreement with the plaintiff and/or whether there is a binding sale and purchase agreement between the defendants and the plaintiff?

(b) whether the interveners' rights prevail over the plaintiff's purported purchase of the said property?

(c) whether the plaintiff's offer to purchase was accepted by the first defendant or were there conditions precedent which were then not met? and

(d) whether the plaintiff had a caveatable interest to lodge a private caveat on the title of the said property?

PARTIES' RESPECTIVE CONTENTIONS/SUBMISSIONS

The plaintiff's contentions/submissions

[23] The plaintiff's contentions/submissions can be summarised as follows:

(a) there is a valid, binding and concluding contract between the plaintiff and the defendants in respect of the purchase of the said property;

(b) that the second and third defendants had authorised the first defendant to collect the deposit and were therefore also bound by the contents of the voucher; and

(c) the plaintiff has a caveatable interest on the said property having paid the deposit sum of RM20,000.

The defendants' contentions/submissions

[24] The defendants' contentions/submissions are as follows:

(a) on the facts and established evidence of this case, there was no concluded contract or binding sale between the plaintiff and the defendants;

(b) the evidence will reveal that any offer to purchase by the plaintiff was not accepted but clearly communicated to be subject to conditions precedent;

(c) in any event, there was only a contingent contract with the plaintiff and the plaintiff therefore has no enforceable contract;

(d) there was no misrepresentation by the first defendant to the plaintiff. In any event, misrepresentation has not been adequately proven or pleaded and since it has not been pleaded as fraudulent or negligent misrepresentation, it is at best a case of innocent misrepresentation of which it is trite law that no damages can flow; and

(e) finally, that the plaintiff has no caveatable interest in respect of the said property.

The interveners' contentions/submissions

[25] On the part of the interveners, it is contended and submitted as follows:

(a) that there was a binding sale and purchase agreement between the defendants and the interveners before the plaintiff;

(b) the interveners' rights prevail over the plaintiff's purported purchase as the first in time prevails; and

(c) the plaintiff does not have a caveatable interest as the conditions precedent of the sale and purchase between the plaintiff and the defendants were not fulfilled.

[26] I will now proceed to deal with each of the abovementioned broad issues in the following paragraphs below.

Issue No 1: Whether there is a binding sale and purchase agreement between the defendants and the Interveners prior to any concluded agreement with the plaintiff and/or whether there is a binding sale and purchase agreement between the defendants and the plaintiff?

[27] From the respective submissions, there does not appear lo be a serious dispute as to the applicable law relating to the formation of an agreement. It is trite that every contract is an agreement but not every agreement is a legally enforceable contract as only agreements enforceable by law are legally binding contracts. An offer or proposal is one of the essential elements for the formation of a contract. A contract cannot be entered into without one of the parties offering or proposing, and the other accepting. Therefore, both offer and acceptance are essential elements for the formation of a contract.

[28] The Federal Court in the case of *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] 1 MLJ 165; [1963] 1 LNS 77 held as follows:

> It is plain that a contract comes into existence where there has been an unqualified acceptance of a definite and unequivocal offer, the corollary of which is that there can be no binding contract either if a conditional offer is followed by an unqualified acceptance or if an unqualified offer is followed by a conditional acceptance; in either of these two cases no legally binding contract will arise unless and until the stipulated condition is fulfilled. In other words, where a condition is attached to an offer, an unqualified acceptance of that offer must result in a similar situation as will arise on a qualified acceptance of a definite offer. I mention this because in some of the decided cases to which I shall refer in the course of my judgment there was a definite offer followed by a conditional acceptance, but, as I have stated, in my judgment the legal position is the same whether the condition is attached to the offer or to the acceptance.

[29] The plaintiff on the one hand contends that they have a concluded contract as there was an offer which had been accepted by the defendants. The

plaintiff further contends that there was certainty of parties, certainty of price, certainty of property and part performance by way of payment of deposit (see the Federal Court case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625).

[30] However, when considering this issue, I am reminded of the following words of the Court of Appeal in *Eng Song Aluminium Industries Sdn Bhd v Keat Siong Property Sdn Bhd* [2018] 5 MLJ 380; [2018] 9 CLJ 311 where it was enunciated as follows:

> it is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. In this instant case, the length of period of negotiations which took place for about eight months, in our view, would indicate the intention and seriousness of the parties to conclude the sale and purchase agreement as well as the tenancy agreement. Their months of negotiations culminating in the email dated 11 May 2016 had finally concluded all the terms and their intention to complete the sale and purchase and the tenancy agreements. We therefore agreed with learned counsel for the respondent that all the elements of a binding contract were already there. The parties, the property, the price and the terms had been identified with sufficient certainty. See the decision of this court in *Sandrifarm Sdn Bhd v Pegawai Pemegang Harta Malaysia* [2000] 2 MLJ 535; [2000] 3 CLJ 313.

[31] As such, I will now proceed to determine the evidence in totality and the conduct of the parties at the material time to determine whether there was a concluded contract between the defendants and either the plaintiff or the interveners.

[32] As highlighted earlier, there is no dispute that prior to the meeting between Mr Tan of the plaintiff and the first defendant on 21 December 2021, the first defendant had already met the interveners in relation to the sale of the said property. From the evidence both oral and documentary, it is not disputed that the interveners had paid the defendants a sum of RM3,000 as deposit for the sale and that such sale was agreed to and the deposit accepted by the second and third defendants as well. In this regard, both the second and third defendants testified and corroborated the evidence of the first defendant in that they both agreed to sell the said property to the interveners and had accepted their share of the deposit of RM1,000 each. They also further testified and corroborated the first defendant that the first defendant had seen them again in the later part of December 2021 to inform them of the plaintiff's offer which they both rejected the same on the basis that Cheng Hwa Seafood intended to proceed with the sale.

[33] On the plaintiff's part, there is also no dispute that Mr Tan had handed the first defendant a sum of RM20,000 on 21 December 2021 towards the

purchase of the said property. In fact, the first defendant admitted that he signed the said voucher accepting the RM20,000 towards the selling price of RM240,000.

[34] However, in my view, whilst most of the facts remain undisputed, the crucial bone of contention in this matter is what transpired in the meeting between the first defendant and Mr Tan of the plaintiff on 21 December 2021. On the one hand, the first defendant has testified that whilst there was indeed an offer from the plaintiff, such was clearly communicated to be conditional on the interveners aborting the sale and the other co-owners agreeing to the sale to the plaintiff.

[35] On the contrary, the plaintiff testified that he was not informed of the alleged conditions precedent. In my view, much turns on which version is more probable and, in this regard, I am of the view that the first defendant's version is more probable based on the conduct and the contemporaneous documents available at the material time.

[36] Firstly, pursuant to the meeting with the plaintiff, the first defendant has immediately taken steps to see if the conditions precedent could be fulfilled ie that the interveners wanted to proceed with the sale and the second and third defendants agreeing to the sale to the plaintiff. Upon determining on 23 December 2021 that the conditions precedent would/could not be met, he and Ms Pang Kooi Booi took steps to return the said deposit sum of RM20,000 to the plaintiff but to no avail. This fact and the police report lodged is not disputed.

[37] It is also not disputed that the first defendant had instructed a solicitor to write to the plaintiff very soon thereafter on 28 December 2021 setting out in detail the conditions precedent discussed and returning the said deposit sum of RM20,000 as the conditions could not be met. In my view, the immediate conduct aforestated very soon at the material time lends credence to the defendants' testimony. I will at this juncture state that quite apart from his testimony being corroborated by the contemporaneous documentary evidence, I found the first defendant to be a credible witness as his evidence on material aspect was consistent throughout and supported by contemporaneous documentary evidence and also corroborated by other witnesses.

[38] Whilst the plaintiff's solicitors did one month later respond to the defendants' said letter dated 28 December 2021, vide a letter dated 25 January 2022 and returning the RM20,000, it was contended therein that such conditions precedent were an afterthought as no notations of the conditions precedent were made on the plaintiff's voucher on the payment deposit. Whilst it is true that the first defendant did not make any notation of such conditions

precedent on the voucher, in my view, the first defendant's conduct with the interveners and the other defendants immediately thereafter and their solicitors' letter dated 28 December 2021 are more compelling evidence to support the contention that those conditions precedent were in fact communicated to Mr Tan of the plaintiff on the meeting dated 21 December 2021.

[39] Another factor that fortifies my conclusion that there were conditions precedent communicated was the fact that Mr Tan was aware that as at 21 December 2021, the defendants had already agreed to sell the said property to Cheng Hwa Seafood. In this regard, SP1 testified under cross-examination as follows:

> BHS: Mr Tan, ok, bottom line is when you paid the RM20,000, you knew that Pang Guan Hong must go and cancel a sale to Cheng Hwa Seafood. Can you confirm that?
>
> TJM: Yes, he told me he will cancel.
>
> (See pdf p 29 of the notes of evidence dated 23 November 2023.)

[40] PW1 also admitted during cross-examination that he knew the said property was owned by all three defendants and that the first defendant and Ms Pang Kooi Booi (DW2) had attempted to return the deposit sum of RM20,000 three days later followed by the defendants' solicitors letter dated 28 December 2021.

[41] In my view, the facts viewed cumulatively clearly reflect the existence of the conditions precedent as how else would the plaintiff have known that the said property was owned by the three defendants and that there was a prior sale agreed between the defendants and the interveners. As such, the inference to be drawn is that the agreement between the defendants and the interveners had to be terminated first.

[42] As such, I am of the opinion and finding that there were indeed conditions precedent attached to the offer/acceptance which were communicated to the plaintiff. In my further view, even if the offer from the plaintiff was unqualified, it was certainly followed by a conditional acceptance and there can be no legally binding contract unless those conditions are fulfilled. Those conditions were certainly not fulfilled in this case.

[43] Further, reference is made to the Court of Appeal case of *Ketua Setiausaha Kementerian Pertahanan Malaysia & Anor v Bumita Sdn Bhd* [2018] 12 MLJ 275; [2018] 9 CLJ 484 where it was held as follows:

A [31] The terms stipulated in the LOA, in particular in paras 4, 6 and 8 of the LOA are in the nature of conditions precedent, the non-fulfilment of which will negate the existence of a binding contract between the parties. Thus, the defendants were entitled to revoke the LOA (refer to *Malayan Flour Mills Bhd v Saw Eng Chee (the Administrator of the Estate of Saw Cheng Chor, the Deceased) & Anor* [2001] 3 MLJ B 69; [2001] 3 CLJ 18 *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783; [2009] 6 CLJ 501).

[44] Whilst I have concluded above that there was no binding agreement between the defendants and the plaintiff, by applying the same trite principles, C on the other hand, I find that there is a valid and binding agreement between the defendants and the interveners. I conclude as such as it is clear to me that there was an unqualified offer by the interveners with an unqualified acceptance by the first defendant. In addition, there was certainty of parties, certainty of price and certainty of property. D

[45] Furthermore, there were unequivocal acts of part performance of the interveners by way of payment and acceptance of the said deposit. In my view, there was a concluded contract despite there being no formally executed E agreement (see the case of *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746).

[46] In addition, as highlighted earlier, this intention of the interveners to create legal relations was fortified by the preparation of the draft sale and F purchase agreement and the balance 10% of the deposit sum forwarded to the solicitors of the defendants. Contrast this with the conduct of the plaintiff who never forwarded any draft sale and purchase agreement or paid any further sum towards the sale.

G **[47]** The plaintiff draws the court's attention to the fact that whilst the plaintiff has sought a declaration that there is a binding sale and purchase agreement between them and the defendants, the interveners have failed to do so. However, with respect, I do not see the significance of this. In fact, the H interveners have pleaded that they have entered into a sale and purchase agreement with the defendants prior to the plaintiff and paid the deposit and contend that there is no valid sale and purchase agreement entered into between the plaintiff and the defendants and have also mounted a counterclaim for the plaintiff's private caveat to be removed. In my view, that I is sufficient as in the event the court does not give the declaration sought by the plaintiff and removes the plaintiffs private caveat, the interveners do not need any declaration from the court and would be free to complete the sale and purchase transaction with the defendants.

[48] Finally, in passing, it has been brought to the court's attention that SP1 has also admitted during cross-examination that not only was he informed by the first defendant during the meeting on 21 December 2021 that there was an existing agreement with the interveners, he also testified that the first defendant had informed him that such agreement with the interveners would be cancelled (see pdf pp 16–17 of the notes of evidence dated 23 November 2023).

[49] In my view, as submitted by learned counsel for the defendants, the above is indicative that the agreement to sell the said property to the plaintiff was a contingent contract under s 33 of the Contracts Act 1950. I find merits in the defendants' contention that any purported contract cannot be enforced as the event of the cancellation of the agreement with the interveners did not occur (see the cases of *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211; [1983] CLJ Rep 282 and *Hotel Anika Sdn Bhd v Majlis Daerah Kluang Utara* [2007] 1 MLJ 248; [2006] 4 CLJ 981).

[50] In conclusion on this issue, I find that there is a binding sale and purchase agreement between the defendants and the interveners and that there was no such binding agreement between the defendants and the plaintiff.

Issue No 2: Whether the interveners' rights prevail over the plaintiff's purported purchase of the said property?

[51] Having considered the facts and sequence of events in its totality, it is quite clear that it was the interveners who had first reached an agreement and made the deposit for the said property.

[52] It is not disputed that quite apart from the issue of the conditions precedent as discussed earlier, the deposit sum of RM20,000 was only paid by the plaintiff later on 21 December 2021 and that too knowing at the material time that the defendants have agreed to sell the said property to the interveners. In this regard, it is not disputed that the interveners' deposit has been paid and accepted earlier on 13 December 2021.

[53] I agree with the submission of the interveners that by insisting that the defendants accept the said deposit, the plaintiff was doing so with the risk and knowing full well that his offer was subject to the rights already inured to the interveners and subject to the interveners aborting the sale. Since the evidence is overwhelming that the interveners did not indicate any intention to abort the sale but, on the contrary, had the full intent to proceed with the same, they clearly had prior rights over the said property. It also has to be borne in mind that it is the interveners who had first lodged the private caveat on the said property on 24 December 2021 which is prior to the plaintiff's private caveat entered on 27 December 2021. In this regard, reliance can be placed on the

Federal Court case of *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin (F)* [1984] 1 MLJ 160 for me to conclude that when there are two competing equitable interests, the general rule of equity is that the person whose equity is attached first will be entitled over the priority of others.

[54] As such, quite apart from my conclusions on the binding agreements earlier, I also find that being first in time, the interveners' rights prevail over any of that that may belong to the plaintiff.

Issue No 3: Whether the plaintiff had a caveatable interest to lodge a private caveat on the title of the said property?

[55] As highlighted earlier, the defendants and the interveners have both mounted a counter claim for the removal of the plaintiff's private caveat whereby both seek an order that the private caveat be removed and seek damages.

[56] Having perused the private caveat of the plaintiff, there is no doubt that the private caveat entered was premised on the fact that the plaintiff had entered into a sale and purchase agreement with the defendants and had paid a deposit of RM20,000 and that solicitors had been appointed to prepare the sale and purchase agreement. Interestingly however, at para (d) of Form 19B, the plaintiff has stated 'akan tetapi wakil penjual tiba-tiba memaklumkan kepada kami bahawa beliau tidak ingin meneruskan penjualan hartanah tersebut kepada Teckland'.

[57] As such, firstly in my view, it was quite clear that even on the face of Form 19B, the plaintiff had indicated that the defendants did not want to sell the said property to the plaintiff. In any event, as I have concluded earlier that there were conditions precedent for the sale and purchase between the plaintiff and the defendants, I agree with the contentions of the defendants and the interveners that there is no caveatable interest if there are conditions precedent in that there is no contract to be completed until the conditions precedent has been fulfilled. The fact of a condition precedent has been enunciated in the case of *Sinku Akramuz Zaman & Ors v Sri Vijaya Estates Sdn Bhd* [2022] MLJU 741 where it was held as follows:

> [35] The effect of having condition precedent is well illustrated in the Federal Court decision *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181, as referred to by learned counsel for the defendant, Mr Dipendra:
>
> > *The liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the happening of some further event*. In such a case the contract is said to be subject to a condition precedent. *The failure of a condition precedent* may have one of a number of effects. It may, in the first place, *suspend the rights and obligations of both parties*, as, for instance, *where the*

parties enter into an agreement on the express understanding that it is not to become binding on either of them unless the condition is fulfilled ...

[36] In *GPQ Sdn Bhd v Constant View Sdn Bhd* [2017] 6 MLJ 728, the Court of Appeal held that *agreement was unenforceable since the condition precedent had not been complied with* and as such the *respondent had no rights to act on the agreement*. At para [34] Asmabi Mohamad JCA delivering the judgment on behalf of the Court of Appeal said as follows:

It is trite law that if a contract is a conditional contract, there is no contract to be completed unless and until the condition precedent set out in that contract had been fulfilled.

[58] Having considered the above and having found that there were indeed conditions precedent of sale with the plaintiff which have not been fulfilled rendering no valid and binding agreement, there was no basis for the plaintiff's private caveat to be maintained.

[59] In this respect, it is apt that I refer to the case of *Mahabuilders Sdn Bhd v Pentadbir Tanah Johor Bahru & Anor* [2013] 10 MLJ 625 where the High Court held as follows:

The second defendant relied on the Court of Appeal case of *Murugappa Chettiar Lakshamanan v Lee Teck Mook* [1995] 1 MLJ 782; [1995] 2 CLJ 545 where it was held, inter alia:

... *It is clear that nowhere* in the application, for the entry of the caveat, is there an assertion of a *concluded contract for the sale and purchase* of the land in question. *In the absence of such an assertion it cannot be said that the respondent has a claim to the title to the land*.

It is axiomatic that *negotiations for a contract*, however advanced, *do not amount to a contract. Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land. A fortiori, he has no interest that is capable of protection by the entry of a caveat*.

[60] In this case, not only has the plaintiff failed to assert that there was a concluded contract for sale, on the contrary, it quite clearly states therein that the defendant did not wish to sell the said property.

[61] The plaintiff has also drawn the court's attention to the fact that the first defendant had testified and agreed under cross-examination that the plaintiff had a right to enter/register the private caveat on 27 December 2021 considering the fact that the deposit sum of RM20,000 has been paid.

[62] First and foremost, since it is an issue of law as to whether a party has a caveatable interest, the opinion, view and evidence of the first defendant is immaterial. In any event, even assuming for a moment that there was a

caveatable interest on 27 December 2021 due to the payment of the deposit, that interest if any, in my view has certainly lapsed by virtue of the conditions precedent not being met.

[63] As such, I have no hesitation in ordering that the private caveat entered by the plaintiff on the said property be removed on the basis that there is currently no caveatable interest. I will however not go so far as to grant the declaration that the private caveat entered was wrong in the first place. On that basis, I also do not see it fit to make any order for damages against the plaintiff for the registration of such caveat. In any event, no evidence whatsoever has been led by the defendants or the interveners on any losses suffered as a result of the entry of the private caveat.

CONCLUSION

[64] Upon a careful and judicious consideration of the facts and evidence adduced in this matter, I am of the view that the plaintiff has failed to prove its claim on a balance of probabilities. I find that there is no concluded binding contract between the defendants and the plaintiff and as such there is no basis to grant the declarations sought by the plaintiff and/or to order specific performance against the defendants. I also find that there is no basis for the private caveat to be maintained on the said property and order the same to be removed with immediate effect. In respect of the deposit sum of RM20,000 paid by the plaintiff to the defendants, I order the said sum of money to be refunded by the defendants to the plaintiff within 14 days from today.

[65] Finally, as for costs, learned counsel for the plaintiff and the defendants have agreed that due to peculiar circumstances of this case, that there be no order as to costs and I therefore order as such. As for the interveners, since they have intervened and had made a similar counterclaim as that of the defendants, I see no necessity to make any order as to costs in relation to the interveners.

Plaintiff's claim dismissed; counterclaims allowed with no order as to costs.

Reported by Dzulqarnain Ab Fatar